

April 18, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Chang-Su Lim

Date of Filing: March 15, 2005

Case Number: TFA-0077

This Decision concerns an Appeal that was filed by Chang-Su Lim in response to a determination issued to him by the Manager of the Chicago Operations Office (hereinafter referred to as “the Manager”). In that determination, the Manager replied to a request that Dr. Lim submitted for access to a specified document under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. The Manager released the document to Dr. Lim with certain portions withheld. This Appeal, if granted, would require that the Manager release the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

In his FOIA request, Dr. Lim sought access to a copy of a Field Work Proposal entitled “Cellular and Molecular Studies of Radio-Adaptive Responses,” which was submitted to the DOE for agency funding. In response to this request, the Manager released the Proposal to Dr. Lim, but withheld portions of that document pursuant to Exemptions 4 and 5 of the FOIA. In his Appeal, Dr. Lim contests the Manager’s application of Exemptions 4 and 5.

II. Analysis

Exemption 4 shields from mandatory public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is “commercial” or “financial,” “obtained from a person,” and “privileged or confidential.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade

secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criteria. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part & remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552(b)(4). Finally, the agency must determine whether the information is "privileged or confidential." In order to determine whether the information is "confidential," the agency must first decide whether the information was either involuntarily or voluntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

Applying these criteria to the present case, it is clear that the withheld information is "commercial." Although it is scientific in nature, it was submitted to the DOE for the purpose of securing government funding for research on the subject matter of the proposal. It is also clear that the submitter, Lawrence Berkeley National Laboratory (LBNL), an organization operated by the University of California at Berkeley, is a "person" for Exemption 4 purposes. *Nadler v. FDIC*, 92 F.3d 93, 95 (2nd Cir. 1996). There is no claim of privilege with regard to the withheld information. We must therefore determine whether the information is "confidential." Because LBNL was required to provide the information to obtain the funding, it was submitted on an "involuntary" basis, and the *National Parks* test applies.

In his determination, the Manager concluded that release of the withheld information would put LBNL at a competitive disadvantage by "revealing the state of the art and direction of research that" LBNL is pursuing. "Such disclosures could well encourage others to pursue research in these areas and to assist others in competing against" LBNL for future research funding. Determination Letter at 2.

We have been informed by the Manager that the withheld material describes a novel procedure that has not previously been published, and includes detailed research methodologies. *Id.* Furthermore, we have examined the material, and we can find no reason to disagree with the Manager's conclusion. We find there to be a substantial likelihood that release of this information would suggest new avenues of inquiry into the subject of the proposal, or would otherwise aid LBNL's competitors in formulating proposals for future research grants. We therefore reject Dr. Lim's

contention that the Manager improperly applied Exemption 4 in withholding the information in question. *

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Chang-Su Lim, OHA Case Number TFA-0077, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 18, 2005

*/ The Manager also found that disclosure of the theories and ideas for scientific research described in the withheld material would compromise certain rights that the submitter might have to exploit the commercial value of any inventions that arise from work done under the research grant, and that this would result in a competitive disadvantage. However, because we have found that the Manager has already adequately justified withholding the material in question for the reason discussed above, we need not address this additional justification. For a similar reason, we also do not need to address the Manager's finding that release of the withheld information would compromise the government's ability to exploit the commercial value of any inventions that arise from work done under the research grant, and that the information may therefore be withheld under Exemption 5.